JOINT BUDGET COMMITTEE BILL

SUMMARY of H.B. 13-1305:
CONCERNING LIMITED AUTHORIZATION FOR THE GOVERNOR TO ORDER MONEYS TO BE TRANSFERRED FROM THE GENERAL FUND TO THE TOBACCO LITIGATION SETTLEMENT CASH FUND IF ANY PAYMENT OF TOBACCO LITIGATION SETTLEMENT MONEYS TO BE MADE TO THE STATE IS REDUCED DUE TO A FINDING BY AN ARBITRATION PANEL THAT THEY STATE MUST REPAY DISPUTED PAYMENTS OF TOBACCO LITIGATION SETTLEMENT MONEYS ALREADY MADE TO THE STATE.

Prime Sponsors: Representatives Gerou and Levy and Senator Steadman

Bill Summary

The bill requires the Attorney General to immediately notify the Governor, the State Treasurer, the Joint Budget Committee, the Speaker and Minority leader of the House and the President and Minority Leader of the Senate if an arbitration panel makes any findings regarding the failure of the State to diligently enforce part 2 of Article 28 of Title 39 that will reduce the amount of any payment of settlement moneys to the State.[1]

If such notification is provided, the Governor may instruct the State Treasurer to transfer a specific amount up to $40.0 million from the General Fund to the Tobacco Litigation Settlement Cash Fund if:

- The General Assembly is not in regular session;
- The tobacco settlement payment to be received is anticipated to be reduced by more than $35.0 million from the amount projected by Legislative Council Staff when the General Assembly was last in session.
- The funds to be reduced were previously anticipated to be received within 12 months of the arbitration panel finding;
- The amount to be transferred based on: (1) the amount required to cover working-capital advanced from the General Fund for programs funded with the Tobacco Litigation Settlement Cash Fund prior to the arbitration panel finding; and (2) any additional amount required to enable programs to meet critical state obligations and to reduce program expenditures in an orderly manner through the end of the next January.

[1] Part 2 of Article 28 of Title 29 requires that tobacco manufacturers either participate in the Tobacco MSA or place specified revenues into escrow.

Fiscal Impact

This bill will only have a fiscal impact if the conditions specified in the bill are met. Under these circumstances, the bill could result in a transfer of up to $40.0 million from the General Fund to the Tobacco Litigation Settlement Cash Fund, thus reducing amounts in the General Fund reserve.

Background

Tobacco MSA Revenue and Allocations. Pursuant to the Tobacco Master Settlement Agreement reached between states and tobacco manufacturers in the late 1990s, Colorado receives an annual allocation of tobacco settlement funds, estimated at approximately $90 million to be received in April 2013. Annual revenue has fluctuated from $80 to $105 million over the last ten years, due in part to ongoing legal disputes with tobacco manufacturers. Tobacco MSA revenue is distributed to state programs based on statutory funding allocations. The table below shows the allocation of funds for FY 2013-14 based on the Legislative Council Staff January 2013 revenue projection and statutory formulas.

Distribution of Tobacco Settlement Funds by Size of Allocation*

Program	Department	FY 2013-14	Percent
Children's Basic Health Plan Trust	HCPF	$28,376,500	31.5%
Nurse Home Visitor	CDPHE	14,328,277	15.9%
CU Health Sciences Center	DHE	13,623,989	15.1%
Fitzsimons Trust Fund	DHE	7,213,307	8.0%
Early Literacy Program	EDU	4,508,317	5.0%
Tony Grampsas Youth Services	CDPHE	3,606,653	4.0%
Offender Mental Health Services	HUM	3,336,487	3.7%
HIV/AIDS Drug Assistance Program (Ryan White)	CDPHE	3,155,822	3.5%
Local Public Health Agencies	CDPHE	1,946,284	2.2%
AIDS & HIV Prevention Grants	CDPHE	1,803,327	2.0%
Retained in Tobacco Fund	n/a	1,329,243	1.5%
Supplemental State Benefits Contribution	PER	1,251,183	1.4%
Colorado Immunization Fund	CDPHE	1,112,162	1.2%
Tobacco Litigation Defense Account	LAW	1,000,000	1.1%
Autism Treatment	HCPF	1,000,000	1.1%
State Veterans Trust Fund	MIL	901,663	1.0%
Alcohol & Drug Abuse Services	HUM	834,122	0.9%
Child Mental Health Treatment Act	HUM	300,000	0.3%
Health Services Corps	CDPHE	250,000	0.3%
Dental Loan Repayment	CDPHE	200,000	0.2%
State Auditor's Office	LEG	89,000	0.1%
Total		$90,166,336	

*Includes the anticipated impact of H.B. 13-1180.

Non-participating Manufacturers Adjustment - Disputed Payments. As part of the Tobacco MSA, participating states all adopted model legislation requiring escrow payments by non-participating manufacturers (NPMs). This law was intended to level the playing field and limit loss of market share by participating manufacturers (PMs) who were required to make payments to states under the terms of the Tobacco MSA and thus raise prices. Colorado and other states are now involved in a dispute with the PMs regarding whether the states are diligently enforcing these state laws regarding NPM escrow payments.

Pursuant to the Tobacco MSA, the PM's may reduce their annual payments to state by a NPM adjustment under the following circumstances:

- the market share of participating manufacturers declines by 2 percent of more;
- an independent economic consultant finds that the agreement significantly contributed to this decline, and
- an arbitrator finds that a given state failed to diligently enforce is NPM statute.

The PMs have asserted that they are eligible for an NPM adjustment beginning in 2003 and have set in motion the process for determining this for 2003 and subsequent years. An independent economic consultant found that the Tobacco MSA significantly contributed to a PM decline in market share that exceeds 2 percent. Since June 2012, an arbitration panel has been engaged in state-specific hearings to determine whether any states failed to diligently enforce their NPM statutes in 2003. Some states have reached a settlement agreement with the PMs to resolve this issue for 2003 and future years, but Colorado is not participating in this settlement.

If the arbitration panel finds that one or more states subject to arbitration have failed to diligently enforce their NPM statutes, the NPM adjustment is proportionately allocated among those states. If only one state is found to have failed to diligently enforce NPM provisions, that one state can be held financially responsible for participating manufacturers' loss of market share *nationwide*; however, the maximum NPM adjustment penalty faced by a state cannot exceed the total amount of tobacco settlement funds the state received in the year in question.

The arbitration panel is expected to issue its findings regarding the NPM dispute for 2003 during FY 2013-14. These findings will apply to Colorado and other states that are operating under the original terms of the Tobacco MSA (*i.e.*, those states that have not reached a settlement agreement with the PMs regarding the NPM adjustment).

Depending upon the arbitration panel findings for Colorado, the outcome related solely to 2003 disputed payments could range from:

- Receipt of an additional $10.9 million (payout of amounts withheld); to
- Loss of the entire 2003 tobacco allocation for the state ($86.1 million).

The State faces similar potential additional payouts and financial risks related to 2004 and subsequent years.

If the results of the arbitration are favorable for Colorado, any funds received as a result would be deposited to the General Fund, pursuant to current law. However, current law does not address how a finding of non-diligence and resulting loss of funds would be managed. This bill provides a mechanism for addressing this eventuality on a temporary basis until the General Assembly comes into regular session and can make substantive decisions about ongoing funding for programs currently supported with Tobacco MSA revenue.

Timing of Expenditures and "Accelerated" Use of Tobacco MSA Revenue. The minimum threshold for allowing a transfer pursuant to this bill ($35 million in lost funds) as well as the maximum transfer amount ($40 million) are based on when tobacco funds are received and spent. If the reduction is less than $35 million, the General Assembly will be able to address the issue when it is in session, as tobacco expenditures for February through June = $37 million. Likewise, the tobacco expenditures from August through January *of moneys not yet received* are estimated to be $39 million. Colorado currently spends a substantial portion of Tobacco MSA revenue before it is received.

Annual settlement payments arrive April 15 of each year. Beginning in FY 2008-09, and increasing in FY 2009-10, the General Assembly began to "accelerate" the use of tobacco revenues. The Controller advances General Fund working capital to Tobacco MSA programs pending the April payment. The table below reflects when moneys are projected to be received and spent in FY 2013-14.

FY 2013-14 Projected Monthly Tobacco Settlement Allocations					
	Prior Year Revenue (April 2013 Payment)	Current Year Revenue (April 2014 Payment)		Total Monthly Allocation	Cumulative Spending of April 2014
		Allocated Prior to Receipt	Allocated After Receipt		
July	$ 7,403,091			$ 7,403,091	$
August	5,681,396	1,721,695		7,403,091	1,721,695
September		7,403,091		7,403,091	9,124,786
October		7,403,091		7,403,091	16,527,877
November		7,403,091		7,403,091	23,930,968
December		7,403,091		7,403,091	31,334,059
January		7,403,091		7,403,091	38,737,150
February		7,403,091		7,403,091	46,140,241
March		7,403,091		7,403,091	53,543,332
April		3,701,545	3,701,546	7,403,091	60,946,423
May			7,403,091	7,403,091	68,349,514
June			7,403,091	7,403,091	75,752,605
TOTAL*	$ 13,084,487	$ 57,244,877	$ 18,507,728	$ 88,837,092	
Percent	14.7%	64.4%	20.8%	100.0%	

*Balance is not allocated and is used to reduce accelerated payments